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# Comment: Maryland State Bank: The Responsible Solution for Fostering the Growth of Maryland's Medical Cannabis Program

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## COMMENT

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### MARYLAND STATE BANK: THE RESPONSIBLE SOLUTION FOR FOSTERING THE GROWTH OF MARYLAND'S MEDICAL CANNABIS PROGRAM

By: David Bronfein\*

In 2013, Maryland passed its initial medical cannabis law.<sup>1</sup> Although seemingly a success in the medical cannabis reform movement, the law only allowed for “academic medical centers” to participate in the program.<sup>2</sup> In essence, an academic medical center could dispense medical cannabis to patients who met the criteria for participation in their research program.<sup>3</sup> The success of this type of program structure was a concern for medical cannabis advocates,<sup>4</sup> and the concerns were validated when no academic medical centers decided to participate.<sup>5</sup> As a result of this lackluster program, the

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\* J.D. Candidate, 2017, University of Baltimore School of Law. I would like to thank the staff of the University of Baltimore *Law Forum* for all their hard work in effort to refine my comment. Also, I would like to give a special thanks to my faculty advisor, Professor Fred Brown, for his guidance, thoughtful critiques, and general support throughout the comment process. Lastly, I would like to recognize my family for their unwavering support, encouragement, and confidence in me throughout law school.

<sup>1</sup> H.B. 1101, 2013 Leg., 433rd Sess. (Md. 2013).

<sup>2</sup> *Id.*; see also *Maryland House approves bill to legalize medical marijuana*, JURIST.COM (March 26, 2013, 4:00 PM), <http://jurist.org/paperchase/2013/03/maryland-house-approves-bill-to-legalize-medical-marijuana.php>.

<sup>3</sup> Associated Press, *Maryland lawmakers pass medical marijuana bill*, USATODAY.COM, <http://www.usatoday.com/story/news/nation/2013/04/08/maryland-medical-marijuana/2064679/>.

<sup>4</sup> *Id.* (“Maryland has taken a small step in the right direction, but more steps are necessary for patients to actually obtain the medicine they need to alleviate their suffering.”).

<sup>5</sup> Mollie Reilly, *Maryland Senate Passes Overhaul of State's Medical Marijuana Law*, HUFFINGTONPOST.COM (March 27, 2014, 1:57 PM), [http://www.huffingtonpost.com/2014/03/27/maryland-medical-marijuana\\_n\\_5043851.html](http://www.huffingtonpost.com/2014/03/27/maryland-medical-marijuana_n_5043851.html) (“Maryland technically legalized medical pot last year. However, the law limited distribution of the drug to a number of “academic medical centers,” none of which have agreed to participate in the program.”). *Proposed Medical Marijuana Legislation in 2013*, MEDICALMARIJUANA.PROCON.ORG (January 15, 2014, 1:59 PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=005517#MD2> (“Editor’s Note: H.B. 1101 does not provide patient access to medical marijuana and therefore would not make Maryland a legal medical marijuana state. The program established by the bill would only function if a Maryland academic medical center

General Assembly responded by passing a bill<sup>6</sup> during the 2014 Regular Session to create a more inviting program, thereby making Maryland the 21<sup>st</sup> state to enact a comprehensive medical cannabis law.<sup>7</sup> Under H.B. 881, the program was broadened to allow patients, physicians, growers, processors, and dispensaries to operate within a framework that would be set up by the Natalie M. LaPrade Medical Cannabis Commission (the “Commission”).<sup>8</sup> The General Assembly further augmented Maryland’s medical cannabis law with the passage of H.B. 490.<sup>9</sup> The purpose of this legislation, among other things, was to make access to the program easier for patients and physicians.<sup>10</sup>

Maryland’s medical cannabis law tasks the Commission with the generation and promulgation of regulations that govern the medical cannabis program.<sup>11</sup> When H.B. 881 was enacted, the law called for adoption of regulations by the Commission “on or before September 15, 2014,”<sup>12</sup> but, due to many administrative delays, the program’s regulations were not promulgated until September 14, 2015.<sup>13</sup> After the governing regulations were completed, the Commission focused its energy on the creation of an application for which growers, processors, and dispensaries would apply for licensure into the program.<sup>14</sup> These applications were released on September 28, 2015, and called for all interested parties to submit their applications no

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participated; both the University of Maryland Medical System and Johns Hopkins University have indicated they will not participate.”).

<sup>6</sup> H.B. 881, 2014 Leg., 434th Sess. (Md. 2014); S.B. 923, 256th Cong. (2014).

<sup>7</sup> Bruce Leshan, *Md. Governor Signs Marijuana Bills into Law*, WUSA9.COM (April 14, 2014, 6:32 PM), <http://www.wusa9.com/story/news/2014/04/14/maryland-medical-marijuana-law-omalley/7702385/>.

<sup>8</sup> H.B. 881, 2014 Leg., 434th Sess. (Md. 2014); MD. CODE ANN., HEALTH-GEN. § 13-3302 (2015) (“Purpose. - The purpose of the Commission is to develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner.”). *See also* 2014: *A year of reform*, MPP.ORG (November 5, 2015), <https://www.mpp.org/states/maryland/> (“The 2014 medical marijuana law empowered the Natalie M. LaPrade Medical Marijuana Commission to provide relief to patients without the participation of hospitals and to register dispensaries and growers to provide medical cannabis directly to registered patients whose certifying physicians recommend it.”).

<sup>9</sup> H.B. 490, 2015 Leg., 435th Sess. (Md. 2015).

<sup>10</sup> *Id.*

<sup>11</sup> MD. CODE ANN., HEALTH-GEN. § 13-3302(c) (2016).

<sup>12</sup> *Id.* at § 13-3316. (“On or before September 15, 2014, the Commission shall adopt regulations to implement the provisions of this subtitle.”).

<sup>13</sup> MD. CODE REGS. § 10.62.01 (2016).

<sup>14</sup> Archives, NATALIE M. LAPRADE MARYLAND MEDICAL CANNABIS COMMISSION, <http://mmcc.maryland.gov/pages/archives/Archives.aspx> (last updated Nov. 9, 2015).

later than November 6, 2015.<sup>15</sup> The fact that the Commission received 1,081 applications was a testament to the evolution of Maryland's medical cannabis law and the inviting regulations promulgated by the Commission.<sup>16</sup> More specifically, there were 146 applications for fifteen growers licenses,<sup>17</sup> 124 applications for fifteen processors licenses,<sup>18</sup> and 811 applications for 94 dispensary licenses.<sup>19</sup>

So why is this chronological history of the enactment and incipency of Maryland's medical cannabis program important? It is important because Maryland is on the precipice of introducing a brand new (operational) industry within its borders. Although it is only speculation at this point, Maryland is slated to have one of the most inviting and fruitful medical cannabis programs to date, largely due to the enactment of H.B. 490. If this speculation proves true (or even if it does not), there will be medical cannabis-related businesses that require banking solutions as a necessary tool to conduct their business, just like any other traditional business. When operating within the medical cannabis industry, though, this concept is not so simple. Unlike a traditional business, a medical cannabis-related business is greatly hindered from using traditional banking sources because cannabis is considered an illegal substance by the federal government.<sup>20</sup>

This comment will draw a microscope on Maryland to determine if there are options that the state can present to alleviate these businesses from this hindrance and to assist in creating a sense of normalcy as it relates to banking solutions. Part I explains the underlying language of the Controlled Substances Act that drives these banking obstacles. To create an understanding of the heavy imposition that the Controlled Substances Act renders onto the medical cannabis industry, Part II provides a picture of the onerous landscape in which medical cannabis-related businesses currently

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<sup>15</sup> *Id.*

<sup>16</sup> Press Release, Natalie M. LaPrade Maryland Medical Cannabis Commission Announces Senatorial District Breakdown of Dispensary License Applications (Nov. 24, 2015).

<sup>17</sup> MD. CODE ANN., HEALTH-GEN. § 13-3306(2)(i) (2016); *see also* MD. CODE REGS. § 10.62.08.06 (2016).

<sup>18</sup> MD. CODE ANN., HEALTH-GEN. § 13-3309 (2016); MD. CODE REGS. § 10.62.19.05 (2016); *see also* Omar Sacirbey, Potential for Large Patient Pool, Hefty Profit Offsets Onerous Fees in Maryland, MARIJUANA BUSINESS DAILY (Nov. 10, 2015), <http://mjbizdaily.com/lure-of-large-potential-patient-pool-hefty-profits-offsets-onerous-fees-in-maryland/>. *See* Applicants unhappy with MD marijuana commission, WMDT.com, [wmdt.com/news/more-local-news/Applicants-unhappy-ana-commission/39689526](http://wmdt.com/news/more-local-news/Applicants-unhappy-ana-commission/39689526) (explaining how the amount of processing licenses to be pre-approved was narrowed down from "unlimited" to fifteen at the Commission's May 2016 meeting).

<sup>19</sup> *See supra* note 16; MD. CODE REGS. § 10.62.25.06 (2016).

<sup>20</sup> CONTROLLED SUBSTANCE ACT, 21 U.S.C. § 812 (C)(C)(10) (2015).

operate. Following this discussion, Part III will address certain legislative proposals to a solution that the State of Maryland should endeavor to alleviate cannabis-related businesses of the effects of federal laws.

## I. THE ROOT OF THE BANKING PROBLEM FOR THE LEGAL CANNABIS INDUSTRY

At the federal level, cannabis is currently categorized as an illegal substance.<sup>21</sup> The Controlled Substances Act (“CSA”) dictates the legality of certain drugs or substances.<sup>22</sup> Under the CSA, cannabis<sup>23</sup> is designated as a Schedule I substance.<sup>24</sup> Substances under this category are believed to be highly addictive, have no medicinal value, and lack accepted safety protocols for use under medical supervision.<sup>25</sup> This designation is distinctly at odds with the positions of twenty-five states and the District of Columbia that have passed laws creating a medical cannabis program, a recreational adult-use program, or both.<sup>26</sup> Maryland, like the federal government, also maintains a controlled substances scheduling regime under its criminal law statute.<sup>27</sup> But unlike the federal government, Maryland has exempted from criminal or civil prosecution those qualified or licensed participants who cultivate, process, distribute, and/or possess cannabis.<sup>28</sup> In addition, Maryland has reduced its penalties for use or possession of less than ten grams of cannabis to a misdemeanor.<sup>29</sup> This comment does not intend to speak broadly on the inherent conflict between the federal and state laws pertaining to cannabis; however, it is worth noting that states reserve the right to enact their own cannabis laws under the protection of the Ninth and Tenth Amendments.<sup>30</sup>

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<sup>21</sup> 21 U.S.C. § 812.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (The text of the Act spells marijuana as “marihuana.” For purposes of this comment, though, the proper, scientific term, i.e. “cannabis,” will be used in most cases.).

<sup>24</sup> See *infra* note 25.

<sup>25</sup> 21 U.S.C. § 812 (b)(1)(A)-(C) (2015).

<sup>26</sup> 25 *Legal Medical Marijuana States and DC*, MEDICALMARIJUANA.PROCON.ORG (Jun. 28, 2016, 10:44:25 AM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>; see also *State Medical Marijuana Laws*, NCSL (Jun. 20, 2016), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#2>.

<sup>27</sup> MD. CODE ANN., CRIM. LAW § 5-401 (2011).

<sup>28</sup> MD. CODE ANN., HEALTH-GEN. § 13-3313 (2015).

<sup>29</sup> MD. CODE ANN., CRIM. LAW § 5-601(C)(2)(II)(1)-(3) (2016).

<sup>30</sup> U.S. Const. amend. IX. (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); see also U.S. Const. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see generally Andrew King, Comment, *What the Supreme Court*

Although this remains a constitutional truism, the federal government utilizes other powers granted to it by the Constitution to circumvent these states' rights and privileges.<sup>31</sup> So how does the banking industry operate within this hostile and volatile environment? To answer this question, an examination of other federal statutes and regulations needs to be conducted in order to understand the breadth of the CSA's reach.

## II. THE FEDERAL GOVERNMENT'S INDIRECT ENFORCEMENT OF THE CSA

### A. THE IRS'S USE OF A RARE TAX PROVISION TO BURDEN STATE-LICENSED CANNABIS OPERATORS<sup>32</sup>

Imagine you run your own business. In your first year of business, you make \$25,000 in taxable (or net) income. This figure is derived from your Income Statement, which represents that you made \$100,000 in revenue, had \$20,000 in cost of goods sold, and had \$55,000 in ordinary and necessary business expenses.<sup>33</sup> Assuming a 40% combined federal and state tax rate, your business would incur a tax liability of \$10,000. After you reduce this tax liability from your net income, a *profit of \$15,000* remains.<sup>34</sup> Not bad for your first year of business! A business that primarily or exclusively operates within

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*Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 ARK. L. REV. 755 (2006) (discussing the limits of the Supremacy Clause and roles of the states as social laboratories for varying individual liberties).

<sup>31</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the federal government's power to regulate commerce, granted under the Commerce Clause of the U.S. Constitution, enabled the government, through the use of the CSA's prohibition on the manufacture and possession of marijuana, to prosecute offenders in California, even though the marijuana was derived from intrastate manufacture and was possessed for medical purposes under California law); see also *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (holding that the CSA is unambiguous and the medical necessity exception put forth by respondent is directly at odds with congressional intent).

<sup>32</sup> Joel S. Newman, Commentary, *CHAMP: How the Tax Court Finessed a Bad Statute*, 116 TAX NOTES 10 (2007).

<sup>33</sup> Taxable income calculation:  $\$100,000 - \$20,000 = \$80,000 - \$55,000 = \$25,000$ . See 26 U.S.C.S. § 162(a)(2015). See also Financial Ratios (Explanation): General Discussion of Income Statement, ACCOUNTING COACH (Sept. 7, 2016, 4:34 PM), <http://www.accountingcoach.com/financial-ratios/explanation/3> (provides simple example of an Income Statement).

<sup>34</sup> Profit (Loss) calculation:  $\$25,000 - (\$25,000 \times 40\% [= \$10,000]) = \$15,000$ . See Financial Ratios (Explanation): General Discussion of Income Statement, ACCOUNTING COACH (Sept. 7, 2016, 4:34 PM), <http://www.accountingcoach.com/financial-ratios/explanation/3> (provides simple example of an Income Statement).

the cannabis industry is barred from calculating its taxable income in this normal fashion.<sup>35</sup>

Under section 280E of the Internal Revenue Code, a business that produces and/or distributes cannabis is precluded from taking ordinary business deductions.<sup>36</sup> These deductions typically include those expenses that enable an owner to carry on the day-to-day operations of their business, i.e., rent, utilities, wages, marketing expenses, etc.<sup>37</sup> If in the prior example that same business was a legally licensed cannabis business, it would be unable to deduct its ordinary and necessary business expenses in determining its taxable income. Consequently, the business's taxable income would shoot up from \$25,000 to \$80,000.<sup>38</sup> This means now instead of the 40% tax rate being calculated against \$25,000, it is calculated against \$80,000, resulting in a tax liability of \$32,000. In its first year of operation, this business would now sustain a *loss of \$7,000*.<sup>39</sup>

This illustration shows the indirect effect the CSA can impose on a legitimate state operator or, on a larger level, on a legitimate state cannabis program. The federal government, through the Internal Revenue Code, can flex its muscle against legitimate cannabis businesses by making their operations financially unsustainable.<sup>40</sup> This onerous effect of section 280E is

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<sup>35</sup> See *infra* note 38 and accompanying text.

<sup>36</sup> I.R.C. § 280E (2015). (“No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”).

<sup>37</sup> See I.R.C. § 162 (2015).

<sup>38</sup> Taxable income calculation after applying 280E: \$100,000 - \$20,000 = \$80,000; see Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAWYER 429 (2013) (explaining, as a part of a greater tax analysis, the reason that cost of goods sold is always allowed to be deducted, even in the context of an illegal business enterprise); see also *Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r*, 128 T.C. 173, 182 (2007) (“[T]he adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill.” (citing S. Rep. 97-494)).

<sup>39</sup> Profit (Loss) calculation: \$80,000 - \$55,000 = \$25,000 - (\$80,000 x 40% [= \$32,000]) = (\$7,000). See *supra* note 34.

<sup>40</sup> Elizabeth Dolan McErlean, Comment, *The Real Green Issue Regarding Recreational Marijuana: Federal Tax and Banking Laws in Need of Reform*, 64 DEPAUL L. REV. 1079, 1080 (2015) (“[A]ccording to the marijuana industry's principal publication, the inability to deduct business expenses from a seller's federal income tax is the largest threat to the success of marijuana businesses and risks pushing the entire industry underground.”).

actually derived from a logical policy perspective.<sup>41</sup> In 1981, Jeffrey Edmondson (“Edmondson”), a drug dealer from Minneapolis, Minnesota, was tried in U.S. Tax Court after the Commissioner found a deficiency in Edmondson’s 1974 tax return.<sup>42</sup> Even though the court was acutely aware of Edmondson’s illegal business practices, they granted him the allowance to deduct his “ordinary and necessary” business expenses that he incurred to conduct his illegal operation.<sup>43</sup> In 1982, Congress responded to this ruling by enacting section 280E, which was added through the Tax Equity and Responsibility Act of 1982.<sup>44</sup> Since 1982, though, the U.S. Tax Court has only tried a few cases on the basis of this provision.<sup>45</sup>

With the enactment of medical cannabis programs around the United States, it has re-invigorated the use of section 280E as a way to indirectly enforce the CSA against state-licensed cannabis businesses.<sup>46</sup> The *Californians Helping to Alleviate Medical Problems, Inc.* (“CHAMP”) case is where the U.S. Tax Court attempted to work out the nuances of this statute.<sup>47</sup> In *CHAMP*, a California organization provided medical cannabis to its members under the California Compassionate Use Act of 1996.<sup>48</sup> This case presented an interesting issue in that CHAMP operated with a dual purpose.<sup>49</sup> The U.S. Tax Court found that CHAMP’s primary business purpose was to provide caregiving services to its members, who suffered from a variety of serious illnesses.<sup>50</sup> Additionally, the court found that CHAMP’s dispensing of medical cannabis to its members was incidental to this primary purpose.<sup>51</sup> For these reasons, the U.S. Tax Court concluded that it would only disallow those expenses that directly attributed to CHAMP providing medical cannabis to its members.<sup>52</sup>

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<sup>41</sup> *Id.* at 1097 (“This provision was enacted at the height of the Reagan administration's "war on drugs" in 1982, and intended to stop drug kingpins and cartels from claiming tax deductions.”).

<sup>42</sup> *Edmondson v. Comm’r*, 42 T.C.M. (CCH) 1533 (1981).

<sup>43</sup> *Id.*

<sup>44</sup> TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982); *see also supra* note 32.

<sup>45</sup> *See supra* note 32 (“Section 280E has not been cited much since 1982.”).

<sup>46</sup> *See infra* notes 47, 54, and 56.

<sup>47</sup> *Californians*, 128 T.C. at 173.

<sup>48</sup> *Id.* at 174.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (“[CHAMP’s] primary purpose was to provide caregiving services to its members. Its secondary purpose was to provide its members with medical marijuana pursuant to the California Compassionate Use Act of 1996 and to instruct those individuals on how to use medical marijuana to benefit their health.”).

<sup>52</sup> *Id.* at 185. (“Given petitioner's separate trades or businesses, we are required to apportion its overall expenses accordingly.”).



In more recent decisions, the U.S. Tax Court has not found that the organizations involved had “separate trades or businesses” to justify an allocation of expenses.<sup>53</sup> In *Olive v. Commissioner*, the petitioner argued that his business operated in a similar fashion as the business in *CHAMP*, and thus was entitled to a similar allocation of expenses.<sup>54</sup> The Ninth Circuit court, affirming the U.S. Tax Court’s decision, found that petitioner’s business, the Vapor Room, “consisted *solely* of trafficking in medical marijuana,” and no income was attributable to its other services because they were offered to patrons at no cost.<sup>55</sup> More recently, the U.S. Tax Court in *Canna Care, Inc.* continued to affirm its stance on matters related to operators whose primary purpose is the sale of medical cannabis.<sup>56</sup> The court found itself with another petitioner, Canna Care, trying to align itself with the tax treatment of the petitioner in *CHAMP*.<sup>57</sup> The court was not persuaded by petitioner’s arguments, finding, once again, that “petitioner was engaged in one business – the business of selling marijuana,” which prohibited Canna Care from deducting all its ordinary and necessary expenses.<sup>58</sup>

Beyond just the penal aspects that 280E presents, it further highlights a characteristic of the cannabis industry that is greatly in need of reform. The CSA is highly influential when it comes to how banks and cannabis businesses interact, or, more precisely, why they do not interact.<sup>59</sup> The lack of banking is penal in the 280E context because petitioners bear the burden of proving the deficiencies set forth in a tax deficiency notice.<sup>60</sup> Since these businesses operate almost exclusively in cash, it is hard to track the transactions, and, in turn, it becomes difficult to substantiate certain claims regarding expenses in a tax proceeding.<sup>61</sup> In *Olive*, the petitioner failed to substantiate the accuracy of his ledgers because the ledgers were neither “independently prepared” nor indicated any “indicia of reliability or trustworthiness.”<sup>62</sup> Although it is nowhere certain that Mr. Olive’s access to banking would have made him fare

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<sup>53</sup> See *infra* notes 54 and 56.

<sup>54</sup> *Olive v. Comm’r*, 792 F.3d 1146, 1149 (9th Cir. 2015).

<sup>55</sup> *Id.*

<sup>56</sup> *Canna Care, Inc. v. Comm’r*, 110 T.C.M. (CCH) 408 (2015).

<sup>57</sup> *Id.* (“Petitioner asserts that the taxpayer in *CHAMP* was merely an entity doing charitable work. Petitioner’s interpretation of *CHAMP* is incorrect.”).

<sup>58</sup> *Id.*

<sup>59</sup> Becky Olson, *Chart of the Week: 60% of Cannabis Companies Don’t Have Bank Accounts*, MARIJUANA BUSINESS DAILY (Dec. 14, 2015, 2:55 PM), <http://mjbizdaily.com/chart-week-60-cannabis-companies-dont-bank-accounts/>.

<sup>60</sup> *Olive*, 139 T.C. at 29.

<sup>61</sup> Julie Andersen Hill, *Marijuana, Federal Power, and the States: Banks, Marijuana, and Federalism*, 65 CASE W. RES. 598, 600-01 (2015) (“Without access to banking services, marijuana businesses must conduct transactions in cash and spend an inordinate amount of time and resources on cash management.”).

<sup>62</sup> *Olive*, 139 T.C. at 33.

better, it is certain that more of his expenses could have been properly substantiated if he had bank statements to validate his expense claims.<sup>63</sup>

B. THE FEDERAL BANKING ENVIRONMENT AND ITS COMPLIANCE REQUIREMENTS

In the modern banking environment, most banking institutions have a “master account” with a Federal Reserve Bank branch in order to competitively operate.<sup>64</sup> Essentially, a master account allows a banking institution to gain access to nationwide payment and settlement services. By virtue of this access, a bank can provide a full suite of banking solutions to potential customers, including the processing of checks and automated clearinghouse services for electronic payments.<sup>65</sup> By law,<sup>66</sup> these Federal Reserve services are offered to all banking institutions, even nonmember banks and credit unions.<sup>67</sup> The Federal Reserve does require that certain conditions are met in order for a banking institution applicant to obtain and, more importantly, maintain a master account and access to these services.<sup>68</sup>

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<sup>63</sup> See Nathaniel Popper, *As Marijuana Sales Grow, Start-Ups Step in for Wary Banks*, N.Y. TIMES (Feb. 16, 2015), <http://www.nytimes.com/2016/02/17/business/dealbook/as-marijuana-sales-grow-start-ups-step-in-for-wary-banks.html> (discussing the advent of startups to help marijuana-related businesses with alternative banking solutions as well as methods to assist in a more thorough set of recorded transactions).

<sup>64</sup> Bd. of Governors of the Fed. Reserve Sys., *Reserve Maintenance Manual: Master Accounts*, (Jan. 26, 2016, 11:36 AM), [http://www.federalreserve.gov/monetarypolicy/rmm/Chapter\\_1\\_Account\\_Structure.htm#xsubsection-id](http://www.federalreserve.gov/monetarypolicy/rmm/Chapter_1_Account_Structure.htm#xsubsection-id); see also Nathaniel Popper, *Banking for Pot Industry Hits a Roadblock*, N.Y. TIMES (July 30, 2015) [http://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html?\\_r=0](http://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html?_r=0).

<sup>65</sup> See *Judge Tosses Fourth Corner Banking Lawsuit*, MARIJUANA BUSINESS DAILY, (Jan. 6, 2016, 3:40 PM), <http://mjbizdaily.com/judge-dashes-mj-industry-banking-hopes/>; see also Bd. of Governors of the Fed. Reserve Sys., *Policies: The Federal Reserve in the Payments System*, (Jan. 26, 2016, 11:36 AM), [http://www.federalreserve.gov/paymentsystems/pfs\\_frpaysys.htm](http://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm).

<sup>66</sup> See Bd. of Governors of the Fed. Reserve Sys., *Policies: The Federal Reserve in the Payments System*, (Jan. 26, 2016, 11:36 AM), [http://www.federalreserve.gov/paymentsystems/pfs\\_frpaysys.htm](http://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm).

<sup>67</sup> See generally *Id.* (providing an overview of purpose and use of the Federal Reserve payment systems).

<sup>68</sup> 12 C.F.R. § 208.3 (2015).

One such condition concerns a banking institution's requirement to maintain procedures to monitor its compliance with the Bank Secrecy Act<sup>69</sup> ("BSA").<sup>70</sup>

The BSA requires banking institutions to maintain comprehensive compliance programs designed to prevent money laundering.<sup>71</sup> Money laundering is a criminal activity that involves the transformation of illegally obtained funds into the appearance of legitimate funds.<sup>72</sup> One of the first steps a banking institution must take in compliance with the BSA is a customer identification protocol.<sup>73</sup> This applies to both individuals and businesses equally, and requires that, at a minimum, the banking institution must obtain the customer's name, address, and tax identification number.<sup>74</sup> Within a reasonable amount of time after opening an account, the banking institution must verify the customer's information; in other words, to verify the customer is who (s)he says (s)he is.<sup>75</sup> An expectation of a risk assessment protocol is set by federal regulators, which involves banking institutions undertaking sufficient due diligence on each customer.<sup>76</sup> This expectation is not specifically mandated by any law but, rather, is imposed by regulators as a part of their supervisory duties.<sup>77</sup> For high-risk accounts, banking institutions are

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<sup>69</sup> Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of the Titles 12, 18, and 31 of U.S.C.).

<sup>70</sup> 12 C.F.R. § 208.63 ("(a) This section is issued to assure that all state member banks establish and maintain procedures reasonably designed to assure and monitor their compliance with the provisions of the Bank Secrecy Act (31 U.S.C. 5311, et seq.) ... (b) Program requirement. Each bank shall develop and provide for the continued administration of a program reasonably designed to ensure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, the Bank Secrecy Act, and the implementing regulations promulgated thereunder by the Department of the Treasury at 31 CFR part 103. The compliance program shall be reduced to writing, approved by the board of directors, and noted in the minutes.").

<sup>71</sup> Hill, *supra* note 61, at 612 ("Under the Bank Secrecy Act and the USA Patriot Act, financial institutions must maintain robust programs designed to prevent money laundering.").

<sup>72</sup> See *Money Laundering*, THE FREE DICTIONARY (Jan. 28, 2016, 10:27 PM), <http://legal-dictionary.thefreedictionary.com/money+laundering>.

<sup>73</sup> 31 C.F.R. § 1020.220(a) ("If a bank is required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1), then the CIP must be a part of the anti-money laundering compliance program.").

<sup>74</sup> *Id.* at § 1020.220(a)(2)(i).

<sup>75</sup> *Id.* at § 1020.220(a)(2)(ii) ("Customer verification. The CIP must contain procedures for verifying the identity of the customer, using information obtained in accordance with paragraph (a)(2)(i) of this section, within a reasonable time after the account is opened.").

<sup>76</sup> Hill, *supra* note 61, at 612-13.

<sup>77</sup> *Id.* at 612 n.75.

required to make themselves aware of the purpose of the account, source of the funds in the account, and the customer's primary trade.<sup>78</sup>

Utilizing all this gathered information, a banking institution is then tasked with monitoring and identifying any suspicious activity that would reasonably lead the bank to believe money laundering activity is being conducted through its infrastructure.<sup>79</sup> Section 208.62 of the Code of Federal Regulations ("CFR") requires a banking institution to file a Suspicious Activity Report ("SAR") if it "detects a known or suspected violation of [f]ederal law, or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act."<sup>80</sup> Undoubtedly, this provision applies to medical cannabis-related businesses since the CSA is a federal law and categorizes cannabis as a Schedule I, illegal substance.<sup>81</sup> This means two sources of reporting can be issued against these businesses.

The first reporting obligation by a banking institution is related to section 208.62(c)(4), which applies to transactions that "involve potential money laundering or violations of the Bank Secrecy Act."<sup>82</sup> Any transaction that a banking institution "knows, suspects, or has reason to suspect" is derived from an illegal source must be reported.<sup>83</sup> Additionally, a banking institution must submit a report if it believes the transaction is designed to evade the BSA.<sup>84</sup>

Secondly, if a medical-cannabis business was somehow able to escape detection under those criteria, the banking institution has other mandates that require it to make a report to the appropriate federal financial authority. Section 1010.311 of the CFR obligates a banking institution to file a report on any transactions greater than \$10,000 of cash.<sup>85</sup> A medical cannabis-related business that happens to have a banking account would possibly confront an instance (or instances) where this situation applies.<sup>86</sup> The medical cannabis

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<sup>78</sup> *Id.* at 612-13.

<sup>79</sup> 12 C.F.R. § 208.62(a).

<sup>80</sup> *Id.*

<sup>81</sup> *See supra* note 20.

<sup>82</sup> 12 C.F.R. § 208.62(c)(4).

<sup>83</sup> *Id.* at § 208.62(c)(4)(i).

<sup>84</sup> *Id.* at § 208.62(c)(4)(ii).

<sup>85</sup> 31 C.F.R. § 1010.311 ("Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000, except as otherwise provided in this section.").

<sup>86</sup> This sentence is framed as such because many [medical] marijuana-related businesses are unable to obtain and/or maintain a bank account. *See supra* note 59 ("Roughly 60% of companies operating in the cannabis industry don't have bank accounts for their businesses, according to first-of-its-kind data from a survey conducted by Marijuana Business Daily.... Among the plant-touching industry sectors, wholesale cultivation companies have the lowest rate of access to the financial system – 81% of these businesses do not currently have basic services such

industry operates almost entirely in cash,<sup>87</sup> so if a business deposited a week's, maybe a day's, worth of income into its account, it is reasonable to think this amount would be in excess of \$10,000. Under this circumstance, the banking institution would be obligated to submit a report.<sup>88</sup> In either of these two reporting scenarios, a banking institution is required to submit these types of reports to the Financial Crimes Enforcement Network ("FinCEN"), an agency within the U.S. Department of Treasury.<sup>89</sup> With these two reporting obligations, it is easy to understand why the banking environment is extremely difficult to penetrate for the participants in the medical cannabis industry.

Recently, though, the Department of Justice ("DOJ"), in conjunction with FinCEN released guidance to clarify how banking institutions can provide services to cannabis-related businesses while maintaining compliance with the BSA.<sup>90</sup> As previously discussed, if a bank takes money from a customer who operates within an industry that is considered illegal at the federal level, it could lead to a banking institution being found guilty of violating a federal anti-money laundering statute and, possibly, putting its charter in jeopardy.<sup>91</sup> But in an effort to provide comfort within both the banking and legal cannabis industries, the DOJ issued a memorandum ("Cole Memo") entitled "Guidance Regarding Marijuana Based Financial Crimes" on February 14, 2014. This memorandum addressed the DOJ's current position on the matter and announced eight priorities that DOJ attorneys and law enforcement should focus on to remain consistent with the enforcement of the CSA.<sup>92</sup> Among these priorities are:

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as a checking account.").

<sup>87</sup> See David Kelly, *Colorado's pot industry is a cash business. A small credit union wants to change that.*, L.A. TIMES (Dec. 28, 2015), <http://www.latimes.com/nation/la-na-colorado-marijuana-banks-20151229-story.html>.

<sup>88</sup> 31 C.F.R. § 1010.306(a)(1).

<sup>89</sup> 12 C.F.R. § 208.62(b)-(c); see also 31 C.F.R. §§ 1010.100, 1010.306.

<sup>90</sup> See Erin F. Fonté, *U.S. DOJ and FinCEN Release Marijuana Guidelines for Banks*, COX SMITH BANKING BLOG (Jan. 2, 2016), <http://www.coxsmithbanking.com/u-s-doj-and-fincen-release-marijuana-guidelines-for-banks/#.VofymrSZr7U>.

<sup>91</sup> *Id.* ("Under current law, if banks take money from marijuana sales, they risk violation of the Federal Controlled Substances Act ("CSA") and risk prosecution as co-conspirators or aiders and abettors. And simply taking money from an industry that is still illegal at the federal level also means the bank could be guilty of violating federal anti-money laundering statutes."); By virtue of losing FDIC insurance, a bank's charter will be in jeopardy because its charter is conditioned on having this deposit insurance. Friedman, *infra* note 176 ("According to marijuana business owners, some banks have told them that serving their businesses could lead to the banks' losing their FDIC insurance.").

<sup>92</sup> Memorandum for all United States Attorneys, Deputy Att'y Gen., James M. Cole, *Guidance Regarding Marijuana Related Financial Crimes* (Feb. 14, 2014), at 1,

(1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;...(5) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;...(6) preventing marijuana possession or use on federal property.”<sup>93</sup>

The Cole Memo goes on to state that prosecution “may not be appropriate” where the cannabis-related business’s “activities do not implicate any of the eight priority factors.”<sup>94</sup> It further states that a banking institution “must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by [cannabis-related businesses], including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors.”<sup>95</sup> Finally, in conclusion, the Cole Memo highlights that the DOJ’s authority to enforce federal law, i.e., the CSA, is neither undermined by the publication of this memo nor any state law.<sup>96</sup>

In conjunction with the DOJ, FinCEN issued a companion memorandum to also address the proper banking procedures to “enhance the availability of financial services” and mitigate any risk as it relates to banking institutions’ obligations under the BSA.<sup>97</sup> Again, FinCEN reiterates the importance of “thorough customer due diligence.”<sup>98</sup> Similar to the Cole Memo, this guidance includes an extensive list of risk assessment criteria that a banking institution should consider in their due diligence of a cannabis-related business.<sup>99</sup> If a

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[http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20\(2\).pdf](http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20(2).pdf).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2-3.

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Id.*

<sup>97</sup> FINCEN, *BSA Expectations Regarding Marijuana-Related Businesses* (2014), at 1, [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf).

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.* at 2-3 (“(i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related

banking institution concludes it will open an account to a cannabis-related business, it would be required to file a SAR.<sup>100</sup> As previously detailed above, a SAR is not affected by state law and a banking institution is required to file a SAR when it:

knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity...; (ii)...is designed to evade regulations promulgated under the [BSA], or (iii) [lacks a business or apparent lawful purpose].<sup>101</sup>

Since the SAR's foundational purpose is to provide useful information in a criminal investigation and proceeding, the FinCEN guidance segregates filings into three separate categories. These categories are representative of varying risk-profiles as well as a process to confirm that the priorities set forth in the Cole Memo have not been violated by a cannabis-related business.<sup>102</sup>

The three separate categories for SAR filings are: (1) "Marijuana Limited" SAR filings; (2) "Marijuana Priority" SAR filings; and (3) "Marijuana Termination" SAR filings.<sup>103</sup> A banking institution is required to file "Marijuana Limited" SAR when the cannabis-related business has not implicated any violation of one of the eight Cole Memo priorities.<sup>104</sup> A "Marijuana Priority" SAR filing must be made when the banking institution reasonably believes that the cannabis-related business has violated one of the eight Cole Memo priorities or a state law.<sup>105</sup> Lastly, a "Marijuana Termination" SAR filing is required when the banking institution "deems it necessary to terminate a relationship with a cannabis-related business in order

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documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.").

<sup>100</sup> *Id.* at 3.

<sup>101</sup> 12 C.F.R. § 208.62 (c) (4) (i) - (iii).

<sup>102</sup> *See supra* note 97, at 3-7.

<sup>103</sup> *Id.* at 3-5.

<sup>104</sup> *Id.* at 3-4.

<sup>105</sup> *Id.* at 4.

to maintain an effective anti-money laundering compliance program[.]”<sup>106</sup> The FinCEN memo concludes by reiterating that banking institutions, along with non-financial businesses, are still required to report currency transactions (or CTRs) that exceed \$10,000.<sup>107</sup>

Although the issuance of the DOJ’s and FinCEN’s memoranda offered symbolic guidance in the right direction, the overpowering fact remains that these memoranda lack the force of law.<sup>108</sup> It may provide enough comfort to some banking institutions, while others may not want to even come close to dipping their toes into such an uncertain regulatory environment.<sup>109</sup> Additionally, even if a banking institution decides to open accounts for cannabis-related businesses, there are heavy internal operational burdens with all of the customer monitoring and SAR’s reporting.<sup>110</sup> When all these varying application conditions and requirements, regulatory statutes, and government-issued memoranda are considered, the status quo continues to be conflicting. On one hand you have a Presidential administration that recognizes the uncertainties that remain in banking the cannabis industry, and, on the other, a Congress that has not been compelled to make sufficient legislative changes to create a normal environment. Since 1996, the states have utilized their rights and privileges under the Constitution to enact cannabis laws and this re-energized power has swept the nation.<sup>111</sup> Since Congress does not appear to be reacting to this legitimate industry in a responsible way, the states are left to be creative and resourceful. The next section will examine if the State of Maryland has the ability to spearhead a responsible banking initiative to provide a normal and safe banking environment for its future medical cannabis-related businesses.

### III. MARYLAND’S ABILITY TO BE AGILE IN A RIGID BANKING ENVIRONMENT

Although unintended, Maryland may have the tools to establish a banking institution that could support its cannabis-related businesses.<sup>112</sup> As detailed in the previous sections, a banking institution linked to the federal government’s infrastructure must abide by its voluminous regulations.<sup>113</sup> This begs the question – how does an institution “de-link” from the federal government’s

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<sup>106</sup> *Id.* at 4-5.

<sup>107</sup> *Id.* at 7.

<sup>108</sup> *See Anti-Money Laundering Guidance Issued for Banks Seeking to Service Marijuana- Related Businesses*, FINANCIAL FRAUD LAW REPORT (Matthew Bender & Company, Inc., New Providence, NJ), Apr. 2014, 364-365.

<sup>109</sup> *Id.* at 365; *see also supra* note 90.

<sup>110</sup> *Id.* at 365.

<sup>111</sup> *See supra* note 26.

<sup>112</sup> *See infra* Part A.

<sup>113</sup> *See supra* Part II.B.



infrastructure? With the modern banking system so interconnected, the idea of not operating within a system that in some way touches the federal banking infrastructure may seem far-fetched.<sup>114</sup> The forthcoming sections will explore whether Maryland has the necessary tools or mechanisms for first-of-a-kind initiatives to combat this banking problem that plagues cannabis-related businesses.

#### A. MARYLAND STATE BANK

The State of Maryland could make a significant statement to both the nation and federal government by stepping in as the main banker for licensed cannabis-related businesses in the state. Currently, Maryland does not have any form of a state-owned banking institution.<sup>115</sup> In fact, North Dakota is the only state in the country that has a state-owned bank.<sup>116</sup> In 1919, the State of North Dakota established its own bank to service the credit needs of its agrarian sector in response to the sector's unmet needs from out-of-state economic powers.<sup>117</sup> The Bank of North Dakota ("BND") was formed under

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<sup>114</sup> See generally Bd. of Governors of the Fed. Reserve Sys., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS (9th ed. June 2005) (detailed publication discussing the Federal Reserve System and its role within the monetary system).

<sup>115</sup> "Legislation has been proposed to create a state (or county) bank in Maryland, which is evidence that no such financial institution exists." See H.B. 794, 2016 Leg., 436th Sess. (Md. 2016) (introduced and first read on Feb. 8, 2016); see also H.B. 1306, 2013 Leg., 433rd Sess. (Md. 2013) (introduced and first read on Feb. 8, 2013) (this is the original bill put forth by Delegates Gutierrez, Luedtke, and Moon in 2013, which never received a formal vote on the House floor).

<sup>116</sup> See Josh Harkinson, *How the Nation's Only State-Owned Bank Became the Envy of Wall Street*, MOTHER JONES (Mar. 27, 2009), <http://www.motherjones.com/mojo/2009/03/how-nation's-only-state-owned-bank-became-envy-wall-street>; see also H.B. 794, Fiscal and Policy Note (Md. 2016) ("North Dakota is the only state that currently owns and operates a bank.").

<sup>117</sup> Harkinson, *supra* note 116 ("It was created [97] years ago, in 1919, as a populist movement swept the northern plains. Basically it was a very angry movement by a large group of the agrarian sector that was upset by decisions that were being made in the eastern markets, the money markets maybe in Minneapolis, New York, deciding who got credit and how to market their goods...In North Dakota...they actually took control of the legislature and created what was called an industrial program, which created both the Bank of North Dakota as a financing arm and a state-owned mill and elevator to market and buy the grain from the farmer."); see also *Public Banks: Bank of North Dakota*, INSTITUTE FOR LOCAL SELF-RELIANCE (July 2, 2015), <https://ilsr.org/rule/bank-of-north-dakota-2/>.

a funding model, meaning it takes the State of North Dakota's deposits<sup>118</sup> and redistributes these funds into the local economy in the form of loans.<sup>119</sup> Also, as a part of its model, BND allocates half its profits to the state's General Fund, thus providing another source of revenue for the state.<sup>120</sup> Despite that the model and mission of the BND was (and, for the most part, remains) so niche, it has been able to become a large and sustainable banking institution.<sup>121</sup>

Like North Dakota in 1919, Maryland will have an industry that will need access to credit and a place to make deposits.<sup>122</sup> Similarly, the future cannabis-related businesses will be akin to the frustrated farmers in North Dakota who needed access to financial services. There is recent precedent for Maryland legislators attempting to promote a state bank.<sup>123</sup> In 2013, and again in 2016, Maryland delegates introduced legislation to initiate a task force to assess whether the State should create its own banking institution.<sup>124</sup> In 2013, H.B. 1306 was introduced but it received an "unfavorable" vote from the House Economic Matters Committee.<sup>125</sup> Three years later, this same bill has been re-invigorated and re-introduced as H.B. 794.<sup>126</sup>

The purpose of H.B. 794 is to authorize political subdivisions to establish a public banking institution and a task force to review and evaluate the creation of a Maryland State Bank.<sup>127</sup> Focusing on the latter purpose, the bill's Fiscal and Policy Note states that the task force would review and evaluate the creation of a Maryland State Bank that would meet specified goals, including:

- Perform a general assessment of the State's current network of public and private financial resources for

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<sup>118</sup> *Id.* It is noteworthy that the State of North Dakota pays a competitive rate on the state's deposits. *Public Banks: Bank of N.D.*, INSTITUTE FOR LOCAL SELF-RELIANCE (July 2, 2015), <https://ilsr.org/rule/bank-of-north-dakota-2/>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Harkinson, *supra* note 116 ("[T]he Bank of North Dakota, with its \$4 billion under management, has avoided the credit freeze by 'creating its own credit, leading the nation in establishing state economic sovereignty.'").

<sup>122</sup> See generally Douglas Fischer and Jodi Avergun, *Pot Banking 2016: More State Ballots But Continued Unease*, AMERICAN BANKER (Feb. 1, 2016), <http://www.americanbanker.com/bankthink/pot-banking-2016-more-state-ballots-but-continued-unease-1079125-1.html> (highlighting the current banking environment and limited access to banking services by marijuana-related businesses).

<sup>123</sup> See *infra* note 124.

<sup>124</sup> See H.B. 794, 2016 Leg., 436th Sess. (Md. 2016) (introduced and first read on Feb. 8, 2016) [hereinafter "H.B. 794"]; H.B. 1306, 2013 Leg., 433rd Sess. (Md. 2013) (introduced and first read on Feb. 8, 2013) [hereinafter "H.B. 1306"].

<sup>125</sup> MD. H. ECON. MATTERS COMM., Voting Record of the Public Banking Institution - Authorization and Task Force, H.B. 1306, 2013 Leg., 433rd Sess. (Md. 2013).

<sup>126</sup> See *supra* note 124.

<sup>127</sup> See H.B. 794, Fiscal and Policy Note (Md. 2016).

the purpose of identifying potential areas of State bank focus;

- Examine how a State bank may support a strong private-sector financial community that would provide capital for businesses in Maryland;
- Examine various administrative and operational structures for organizing a State bank;
- Consider options for integrating a State bank model into the existing State financial services network; and
- Examine the long-term impact of creating a Maryland State Bank on economic growth, job creation, and State revenues.<sup>128</sup>

While this bill's purpose is not derived from the needs of future cannabis-related businesses, the majority of its customer base could, ultimately, be these businesses.

Using the above-specified goals as a guide, it becomes clear that a state bank's utility in the context of the medical cannabis industry would be profound. First, the proposal calls for the task force to identify a potential area of state bank focus.<sup>129</sup> This is easy - the medical cannabis industry. It is projected that the Maryland medical cannabis program will exceed \$800 million in revenue by 2020.<sup>130</sup> An industry of this magnitude deserves adequate attention and cultivation through access to banking services.

Second, the task force must examine how a State bank could provide support to the private banking sector.<sup>131</sup> One characteristic of the BND that has allowed them to sustain a culture of growth and acceptance in their banking community is that it acts as a partner to the banks in the private sector rather than a competitor.<sup>132</sup> If a local bank originates a loan, the BND may partner

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Projection based upon aggregating the estimated patient penetration rate, ramp up of this population, pricing of products, split of products demanded, and consumption rate of products by patient population; *see generally* Executive Summary, Arcview Market Research & New Frontier, *The State of the Legal Marijuana Markets* (4th Ed.), <http://www.arcviewmarketresearch.com/thanks-es> (projects the total revenues for the U.S. legal marijuana market to be \$22.8 billion by 2020; if you project Maryland's market on a straight-line pro rata basis [based on patient population], it equates to \$785 million.).

<sup>131</sup> *See supra* note 127.

<sup>132</sup> *See supra* note 116 ("The interesting thing about the bank is we understand that we walk a fine line between competing and partnering with the private sector. We were designed and set up to partner with them and not compete with them. So most of the lending that we do is participatory in nature."). *See also supra* note 119 (the section titled "Backing Community Banks and Credit Unions" displays how the

on the loan to mitigate some of the risk.<sup>133</sup> Additionally, the BND may provide guarantees on certain loans to encourage entrepreneurial activity.<sup>134</sup> Much like the BND, a Maryland State Bank could distinguish itself by achieving growth through banking the medical cannabis industry, and sharing that growth by participating in ancillary activities to further bolster the health of the banking community as a whole.

Thirdly, the task force is charged with providing an analysis on potential organizational structures for a state bank.<sup>135</sup> This is a particular area where Maryland could be a trailblazer for the national medical cannabis industry. Maryland's Corporations and Associations statute allows for the creation of a benefit corporation.<sup>136</sup> A benefit corporation is a for-profit entity form used when an entrepreneur's core mission is to create a material, positive impact on society and/or the environment.<sup>137</sup> The flexibility of this type of entity structure allows for social considerations in conjunction with the traditional maximization of profit.<sup>138</sup>

Maryland's benefit corporation statute states the purpose of the benefit corporation shall be to "creat[e] a general public benefit."<sup>139</sup> A general public benefit means "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."<sup>140</sup> The statute goes on to further detail what specific public benefits include, listing seven possible benefits.<sup>141</sup> Many of the specific public benefits are applicable to creating a state bank that supports a burgeoning medical industry. For instance, one of the specific public benefits is "improving human health."<sup>142</sup> By virtue of the Maryland State Bank catering to an industry that improves, or is attempting to improve,

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Bank of North Dakota supports the state's financial institutions).

<sup>133</sup> See *supra* note 116.

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* note 127.

<sup>136</sup> MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to 5-6C-08 (2016).

<sup>137</sup> FAQ. BENEFIT CORP. (last visited Feb. 26, 2016, 12:39 AM), <http://benefitcorp.net/faq.BENEFIT CORP.>, <http://benefitcorp.net> (last visited Feb. 26, 2016, 12:39 AM).

<sup>138</sup> *Id.*

<sup>139</sup> MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(a)(1) (2016).

<sup>140</sup> *Id.* at § 5-6C-01(c).

<sup>141</sup> *Id.* at § 5-6C-01(d) (list includes: "(1) Providing individuals or communities with beneficial products or services; (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) Preserving the environment; (4) Improving human health; (5) Promoting the arts, sciences, or advancement of knowledge; (6) Increasing the flow of capital to entities with a public benefit purpose; or (7) The accomplishment of any other particular benefit for society or the environment.").

<sup>142</sup> *Id.*

the health of the residents (and guests) of the State, it follows that the bank is providing a beneficial service. In addition, a benefit corporation may “provid[e] individuals or communities with beneficial products or services.”<sup>143</sup> This is closely tied with the previous one in that a State bank supporting an industry that creates medicinal products, and/or provides medical education services, would undoubtedly qualify as providing beneficial products and services. Lastly, a benefit corporation’s specific public benefit may be “increasing the flow of capital to entities with a public benefit purpose.”<sup>144</sup> A state bank that facilitates capital to cannabis-related businesses is providing capital to entities that are generating a public benefit through their medicinal products and services. It is unclear from the statute whether the recipient of that capital needs to be structured as a benefit corporation to receive these funds, or if the business’s mission only needs to fit within the definition of “general public benefit.” If the latter, then most, if not all, cannabis-related businesses in the State of Maryland will fall within this definition.<sup>145</sup>

Structuring a state bank in this fashion displays a good faith intent that the State is not solely driven by profit motive. The motive, instead, to assist a new industry that cannot conduct business in the same way most industries can, in that, it does not have access to financial services.<sup>146</sup> This entity form also allows for a traditional corporate structure, which means shareholders, board of directors, and officers.<sup>147</sup> The BND serves as a quality governance model for a Maryland State Bank. The BND is overseen by the North Dakota Industrial Commission, which essentially serves as the board of directors.<sup>148</sup> This group consists of North Dakota’s Governor, Agriculture Commissioner, and Attorney General.<sup>149</sup> “The powers of the Industrial Commission and the functions of the Bank must be implemented through actions taken and policies adopted by the Industrial Commission.”<sup>150</sup> This commission also defines the duties of the advisory board, which is made up of experts appointed by the

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See MD. CODE ANN., CORPS. & ASS’NS § 5-6C-01(d) (2016).

<sup>146</sup> See *supra* Part II.

<sup>147</sup> MD. CODE ANN., CORPS. & ASS’NS § 5-6C-02 (2016).

<sup>148</sup> *Leadership*, BANK OF NORTH DAKOTA (Feb. 26, 2016, 1:49 am) <https://bnd.nd.gov/leadership/>. See also *Public Banks: Bank of North Dakota*, INSTITUTE FOR LOCAL SELF- RELIANCE (July 2, 2015), <https://ilsr.org/rule/bank-of-north-dakota-2/>.

<sup>149</sup> *Id.*

<sup>150</sup> See *supra Leadership*, BANK OF NORTH DAKOTA (last visited Feb. 26, 2016, 1:49 AM).

governor.<sup>151</sup> In addition, the commission elects the officers, just as a normal board of directors of a corporation would do.<sup>152</sup>

As a part of the legislation to create a Maryland State Bank, the language should include a directive to form the bank as a benefit corporation—or structure it like a benefit corporation—whose purpose is to serve the banking needs of the medical cannabis industry. Additionally, the language should create a governance structure similar to, or the same as, the BND. With a social purpose at its core, along with leadership of top ranking officials of the State and industry experts, it is hard to imagine that the Maryland State Bank could (or would) conduct any nefarious activity, which the federal government should prosecute. In other words, this structure creates layers of certainty to the mission of providing banking services in a fashion that would exceed the federal drug priorities of the federal government.

Fourth, the task force must consider options for integration of a state bank model into the existing State banking network.<sup>153</sup> Like the BND, this is an area where playing the role of banking partner will likely go a long way for both the medical cannabis industry and private banks, particularly community banks, who want to create new banking relationships in the medical cannabis industry. The BND partners with other banks to mitigate risk through some of their lending programs.<sup>154</sup> Also, by virtue of its conservative business model, the BND has seen steady growth over the past two decades.<sup>155</sup> It is its model and growth that allowed the bank to provide financial stability to North Dakota's banking system during the recent financial crisis by providing liquidity to banks that needed to improve their capital levels.<sup>156</sup> If the Maryland State Bank instituted a pragmatic and disciplined model, there seems to be limited reasoning why a state bank could not provide the financial stability to the Maryland banking system, much like the BND has provided for its state. With the benefit of a very captive audience, i.e., medical cannabis-related businesses, a Maryland State Bank would have little issue raising capital through deposits, and using said capital for logical development and for strategic banking partnerships.

Finally, the task force must examine whether a Maryland State Bank could have an impact on long-term economic growth, job creation, and State

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<sup>151</sup> *Leadership*, *supra* note 148.

<sup>152</sup> *Leadership*, *supra* note 148 (“Industrial Commission shall operate, manage, and control Bank of North Dakota,...and make and enforce orders, rules, regulations, and bylaws for the transaction of its business.”).

<sup>153</sup> *See supra* note 127.

<sup>154</sup> *See supra* note 116.

<sup>155</sup> *See Id.* (“The bank has grown substantially over the last two decades. Its assets have expanded sevenfold, and its net income, or profit, rose from \$22 million in 1995 to \$111 million in 2014.”).

<sup>156</sup> *See supra* note 116.

revenues.<sup>157</sup> If a Maryland State Bank were to be formed with the core mission to support the medical cannabis industry through accessible and reliable banking services, it logically follows that this bank would serve the initiatives listed above. Turning again to the BND, this institution has not only been able to sustain the agrarian sector, but now also supports local businesses and residents through its lending programs.<sup>158</sup> Most notably, the inclusion of a state bank into the North Dakota banking system has allowed for a local banking system that is more robust than those of other states.<sup>159</sup> North Dakota's 1919 initiative to support a sector of its economy has morphed into a banking institution that provides more for their state than they ever could have imagined. Although a Maryland State Bank may be viewed as a band-aid solution to the federal-state banking conflicts, the current banking environment presents an opportunity to create a unique institution that could leverage the success of a new industry to ultimately offer services that are not provided by traditional banks.

This analysis of the assessment measures listed in H.B. 794's Fiscal and Policy Note shows that a Maryland State Bank should be more than just a consideration – it should be made a reality through legislation. If this is a route the legislature is willing to take, a new bill would need to be filed to include language that is specific to a mission to assist the medical cannabis industry with their banking needs. Additionally, the legislature should look to the officials and experts in North Dakota to consult on the crafting of a bill and the creation of a bank of this nature.

### *1. The Practical Implications of a Maryland State Bank*

Although a legislative measure could (and should) be taken to create a Maryland State Bank, it is appropriate to analyze the practical realities of the state getting into the business of banking. It is easy to say that having the full faith of the state behind a bank makes the idea viable, but, practically, the questions and concerns that exist need to be adequately reconciled to truly assert this idea. One of the more vexing concerns with getting into the business of banking cannabis-related businesses is to determine how it will insure customer deposits.

In order to examine this concern, possible banking structures need to be discussed, because the structure will guide how to address this concern. This discussion is important because Maryland's statute offers a few routes with regards to banking structures.<sup>160</sup> The focus of this comment is only on a commercial bank structure and credit union structure, both of which are

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<sup>157</sup> See *supra* note 127.

<sup>158</sup> See *supra* note 116.

<sup>159</sup> See *Id.*

<sup>160</sup> See generally MD. CODE ANN., FIN INST. §§ 1 to 13 (2016).

included in Maryland's Financial Institutions statute.<sup>161</sup> First, it is worth expressing that, although the benefit corporation entity form and designation should be a requirement within a State bank bill, ultimately it may not be necessary to incorporate as a benefit corporation. This is because both the commercial bank and credit union statutes call for incorporators<sup>162</sup> to file with the Commissioner<sup>163</sup>.<sup>164</sup> In other words, taking the initial step to incorporate as a benefit corporation is unnecessary, but the core principles of the benefit corporation should not be set aside by virtue of this unnecessary step.<sup>165</sup> The legislation could craft a policy mission and structure that likens itself to a benefit corporation.<sup>166</sup>

a. Maryland State Bank structured as a Commercial Bank

Focusing first on a State bank structured as a commercial bank, it is necessary to begin the discussion with the ability to obtain deposit insurance for future customer accounts. All Maryland banks are required to be members of the Federal Deposit Insurance Corporation ("FDIC").<sup>167</sup> This requirement means that each customer account is insured up to \$250,000.<sup>168</sup> Since the FDIC is an independent agency created by Congress, federal law guides it.<sup>169</sup>

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<sup>161</sup> *Id.* at §§ 3, 6.

<sup>162</sup> MD. CODE ANN., FIN. INST. § 3-201 ("Five or more adult individuals, each of whom is a citizen of this State and the United States, may act as incorporators to form a State bank ..."); MD. CODE ANN., FIN. INST. § 6-301 ("Seven or more adult individuals, each of whom is a resident of this State, may act as incorporators to form a credit union ..."). It should be noted that if the state took this legislative approach, it would likely draft around this requirement as it would not make sense under these circumstances.

<sup>163</sup> MD. CODE ANN., FIN. INST. § 1-101(g) ("'Commissioner' means the Commissioner of Financial Regulation in the Department of Labor, Licensing, and Regulation.").

<sup>164</sup> MD. CODE ANN., FIN. INST. §§ 3-202 to 3-203; MD. CODE ANN., FIN. INST. §§ 6-305 to 6-309.

<sup>165</sup> *Id.* (The process of submitting articles of incorporation to the Commissioner is the only step required to incorporate).

<sup>166</sup> See *supra* Part III.A. and accompanying text pp. 45-47 (discussing Maryland's benefit corporation statute).

<sup>167</sup> *Office of the Comm'r of Fin. Regulation, FAQ: Banks and Credit Unions*, MARYLAND DEPARTMENT OF LABOR, LICENSING, AND REGULATION, <http://www.dllr.state.md.us/finance/banks/bankfaqs.shtml> (last visited Mar. 13, 2016) ("All banks in Maryland must be members of the Federal Deposit Insurance Corporation (FDIC).").

<sup>168</sup> *Id.* ("[E]ach customer's deposits are insured up to \$250,000.").

<sup>169</sup> 12 U.S.C.A. § 1811; see also Mission, Vision, and Values, FDIC, <https://www.fdic.gov/about/strategic/strategic/mission.html> (Mar. 13, 2016) ("The Federal Deposit Insurance Corporation (FDIC) is an independent agency created by



Consequently, access to FDIC insurance could prove to be a barrier to a state bank structured as a commercial bank. Currently, it is unknown how the FDIC would react to an application by a new banking institution whose primary customer base is cannabis-related businesses.<sup>170</sup> Again, it is worth noting that since this would be a bank backed by the State of Maryland and its agents, the FDIC may take a different approach with this institution as opposed to if they were dealing with a private group.

Assuming the deposit insurance through the FDIC was not an option, the State could self-insure the deposits to an equivalent amount. This proposal would need to carve-out a deposit insurance exception if a state bank is unable to retain FDIC coverage but, instead, utilizes self-insurance. In other areas where the State is exposed to liability, mainly in its administration of governmental duties, it does self-insure against loss.<sup>171</sup> The State Insurance Trust Fund (“SITF”) provides the reserves for the State of Maryland’s self-insurance.<sup>172</sup> By statute, the General Assembly is required to appropriate money in the State budget for SITF reserves.<sup>173</sup> When putting forth this proposed legislation, it is important to emphasize that this state bank would plan on being self-sufficient, outside of initial funding to start up the institution. This is key because proponents of this idea should squarely address any opponents’ issues regarding the notion that State funding is being funneled away from existing obligations. Like BND, a state commercial bank could, and should, earmark a large percentage of its profits to be allocated back to the State’s General Fund.<sup>174</sup> In turn, all or some of these earmarked funds should

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the Congress to maintain stability and public confidence in the nation's financial system . . .”).

<sup>170</sup> Robert McVay, *Marijuana Banking Roundup*, CANNA BANKING BLOG (Feb. 11, 2015), <http://www.cannalawblog.com/marijuana-banking-roundup/> (“The FDIC, however, to our knowledge, has not publicly signed off on an institution dealing with marijuana businesses. . . Still, it is worth paying attention to whether the FDIC ever clearly approves of one of its banks getting involved in significant amounts of marijuana business . . .”).

<sup>171</sup> See *Insurance*, MARYLAND STATE TREASURER, <http://www.treasurer.state.md.us/insurance.aspx> (Mar. 13, 2016).

<sup>172</sup> See generally MD. CODE ANN., STATE FIN. & PROC. §§ 9-101 to 9-108 (2016); See also State of Maryland, *Insurance Coverage at a Glance* (June 13, 2016), [https://www.treasurer.state.md.us/media/28324/state\\_insurance\\_coverage\\_at\\_a\\_glance.pdf](https://www.treasurer.state.md.us/media/28324/state_insurance_coverage_at_a_glance.pdf) (brief memorandum discussing the self-insurance and commercial insurance policies of the State of Maryland).

<sup>173</sup> MD. CODE ANN., STATE FIN. & PROC. § 9-103(b)(3) (“The General Assembly intends that the State budget include sufficient General Fund appropriations to provide in the State Insurance Trust Fund a reserve that the Treasurer considers adequate to cover losses under § 9-105 of this title.”).

<sup>174</sup> Harkinson, *supra* note 116 (“ . . . We also provide a dividend back to the state. Probably this year we’ll make somewhere north of \$60 million, and we will turn over about half of our profits back to the state general fund. . . .”); see David

be allocated to the SITF, thus making the self-insurance aspect of this proposal self-sufficient.

If the deposit insurance component of a state bank is achievable either by FDIC coverage or self-insurance coverage, then this approach will certainly be attractive to cannabis-related businesses. For instance, these businesses would now have a banking institution where their cash is adequately safeguarded, which is beneficial from a public safety perspective as well as an accounting perspective.<sup>175</sup> In addition, cannabis-related businesses could issue checks to employees and service providers that could be drawn against their account. Again, this is beneficial for the reasons just stated – neither employees nor service providers are carrying a lot of cash and the cannabis-related business can accurately track its debits and credits.<sup>176</sup> Furthermore, a cannabis-related business who banks with the Maryland State Bank will be comforted by the fact that its account is insured, and that under this structure the contents of its account will not be seized by the federal government.<sup>177</sup>

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Goldstein, *A State-Run Marijuana Bank: It Would Solve Two Problems at Once*, THE STRANGER (Dec. 18, 2013), <http://www.thestranger.com/seattle/a-staterun-marijuana-bank/Content?oid=18503399> (discussing Washington State's state bank proposal, S.B. 5955, the author states, "The state, rather than the Federal Deposit Insurance Corporation, would guarantee deposits, providing additional protections from federal seizure, while profits from banking operations would be returned to the state.").

<sup>175</sup> Nathaniel Popper, *Banking for the Pot Industry Hits a Roadblock*, N.Y. TIMES: DEALBOOK (July 30, 2015), [http://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-forcannabis.html?\\_r=0](http://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-forcannabis.html?_r=0) ("Nearly all banks have refused to open accounts for the hundreds of marijuana businesses in Colorado and other states with similar laws, leaving the businesses to operate in an all-cash economy with the significant dangers that can bring. Many small-business owners in the state have had to improvise with safes, armored cars and other alternatives to banking."); Omar Sacribey, *After Year of Setbacks, Future of Cannabis Banking More Uncertain Than Ever*, MARIJUANA BUSINESS DAILY (Feb. 23, 2016), <http://mjbizdaily.com/after-year-of-setbacksfuture-of-cannabis-banking-more-uncertain-than-ever/> (quoting Nevada Congresswoman Dina Titus, the author writes, "The arguments, especially for banking, are just so obvious. If they're able to do banking, there's more record keeping, more accountability, it's easier to tax and regulate.").

<sup>176</sup> *Id.*; see also Gordon Friedman, *The Best Kept Secret in the Marijuana Industry*, STATESMAN JOURNAL (Dec. 30, 2015, 3:31 PM), <http://www.statesmanjournal.com/story/money/business/2015/12/24/best-kept-banking-secret-marijuanaindustry/76727296/> ("Most [marijuana-related businesses] are stuck conducting transactions in cash, including vendor payments and payroll. Large safes can often be found at marijuana dispensaries, a necessity when handling so much cash.").

<sup>177</sup> See generally David Migoya, *Bank in federal seizure says pot-related accounts are quickly closed*, THE DENVER POST (updated April 27, 2016 at 12:27pm), <http://www.denverpost.com/2014/03/10/bank-in-federal-seizure-sayspot-related->

b. Maryland State Bank structured as a Credit Union

Shifting the focus to a state bank structured as a credit union, it is necessary to begin the analysis with a spotlight on deposit insurance. Much of the analysis is similar to the profile of a commercial bank structure, but there are distinctions that could make this approach more appealing. With regards to credit unions, the FDIC's equivalent is a federal agency called the National Credit Union Association ("NCUA").<sup>178</sup> Unlike the FDIC, the NCUA has received an application by a prospective credit union in Colorado called Fourth Corner Credit Union, whose primary focus is providing banking services to cannabis-related businesses.<sup>179</sup> Although the NCUA does insure credit unions that have customer relationships in the cannabis industry,<sup>180</sup> it appears that they are wary to insure a credit union whose sole focus is providing financial services to legal cannabis businesses.<sup>181</sup> Consequently, should Maryland decide to structure its financial institution as a credit union, deposit insurance through the NCUA appears to be a dead end at this time.

Maryland is one of nine states that currently has a privately insured credit union.<sup>182</sup> This is because Maryland is one of the few states that includes a provision in its credit union statute that allows for private insurance.<sup>183</sup> By virtue of this provision, a privately insured credit union evades NCUA regulation.<sup>184</sup> American Share Insurance ("ASI") is the largest privately held

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accounts-are-quickly-closed/ (illustrating the susceptibility of bank accounts being seized by the federal government).

<sup>178</sup> See *Share Insurance Fund Overview*, NCUA (last visited Mar. 13, 2016), <https://www.ncua.gov/services/Pages/share-insurance.aspx> ("The National Credit Union Share Insurance Fund is the federal fund created by Congress in 1970 to insure member's deposits in federally insured credit unions. Administered by the National Credit Union Administration, provides members with at least \$250,000 of insurance at a federally insured credit union. The Share Insurance Fund is backed by the full faith and credit of the United States.").

<sup>179</sup> See *Complaint, The Fourth Corner Credit Union v. National Credit Union Association* (D. Colo. 2006).

<sup>180</sup> See *About*, SALAL CREDIT UNION (last visited Mar. 13, 2016), <https://www.salalcu.org/about-us/about/> ("Our deposits are NCUA-insured up to \$250,000."); see Friedman, *supra* note 176 (discussing three credit unions in Oregon who are actively working with marijuana-related businesses).

<sup>181</sup> See *supra* note 179.

<sup>182</sup> Hill, *supra* note 61, at 623.

<sup>183</sup> Hill, *supra* note 61, at 623; MD. CODE ANN., FIN. INST. § 6-701(a)(2) ("Each credit union incorporated under the laws of this State shall...[p]articipate in and have its member accounts insured by a credit union share guaranty corporation that is approved by the Commissioner to at least the same extent and amount as provided by the National Credit Union Administration Share Insurance Program.").

<sup>184</sup> Hill, *supra* note 61.

deposit guaranty corporation.<sup>185</sup> One of ASI's territories is Maryland.<sup>186</sup> As such, it is possible that ASI would be willing to provide private insurance to a State-run credit union. First, as previously highlighted, Maryland could decide to self-insure its state-run financial institution.<sup>187</sup> Under this scenario, the state could reach out to ASI for excess insurance, which simply is another layer of deposit insurance.<sup>188</sup> In the event the state does not want to, or cannot, act as the primary insurer, ASI could step in to fill this role and provide deposit insurance up to the same level as the NCUA.<sup>189</sup> It is unclear, though, whether ASI would partner with a credit union whose primary focus is the medical cannabis industry, because it may be subject to penalties under the CSA or anti-money laundering laws.<sup>190</sup>

Assuming one of the deposit insurance options is able to prevail, the credit union structure provides real benefits to both the State and its cannabis-related members. First, the credit union statute includes a provision that exempts credit unions from taxation.<sup>191</sup> Not having this expense will allow for more funds to flow to the individual members, thereby further fostering the financial health of the burgeoning medical cannabis industry. Additionally, any excess profits should be allocated to the General Fund to supplement self-insurance reserves (should the state choose this type of insurance approach). Second, the membership structure allows for the credit union to self-regulate.<sup>192</sup> A new and controversial institution of this nature will be better met by the public if it emphasizes and practices transparency. Lastly, the governance could, and should, be structured similar to how BND is organized, so the state and its agents play an active role in oversight.<sup>193</sup> Having multiple layers of oversight

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<sup>185</sup> See *Company Profile*, AMERICAN SHARE INSURANCE, <http://www.americanshare.com/company/company-profile> (last visited Mar. 13, 2016).

<sup>186</sup> See *Primary Share Insurance*, AMERICAN SHARE INSURANCE, <http://www.americanshare.com/products/primary-insurance/> (last visited Sept. 8, 2016) (click "MD" in dropdown menu to indicate coverage availability in Maryland).

<sup>187</sup> See *supra* notes 171-73.

<sup>188</sup> See *Program Details*, EXCESS SHARE INSURANCE, <http://www.excessshare.com/excessshareinsurance/program-details> (last visited Sept. 8, 2016); see also *Coverage Availability*, EXCESS SHARE INSURANCE, <http://www.excessshare.com/excessshareinsurance/coverage-availability> (last visited Sept. 8, 2016).

<sup>189</sup> *Primary Share Insurance*, *supra* note 186.

<sup>190</sup> Hill, *supra* note 61, at 623-24.

<sup>191</sup> MD. CODE ANN., FIN. INST. § 6-203 ("A credit union incorporated under the laws of this State, including its income, net worth, and other funds are exempt from all taxes imposed by this State or by any of its political subdivisions to the same extent as federal credit unions are exempt.").

<sup>192</sup> *Id.* at § 6-317.

<sup>193</sup> See *supra* Part III.A., at pp. 46-47.

and accountability would prove beneficial to all parties included. From the state's perspective, it wholly deters any nefarious undertakings. From the members' perspective, the participatory nature of the structure allows them to be a part of an integral component to their industry's success.

- c. For either structure, due diligence and compliance are the key components

The absolute key components to the financial stability of a state commercial bank or credit union is customer due diligence and regulatory compliance.<sup>194</sup> Before, and during, its relationship with a banking customer, a state-run bank or credit union would need to commit to a fastidious due diligence program to confirm the derivation of the customers' funds. In other words, the state banking institution will need to continually confirm that a customer is not breaching any of the priorities of the Cole Memo.<sup>195</sup> Additionally, the state banking institution would need to continually issue Marijuana-Limited SARs.<sup>196</sup> One aspect that has allowed Maps Credit Union in Washington State to successfully provide services to cannabis-related businesses is their zero-tolerance policy.<sup>197</sup> A Maryland State Bank should adopt this same policy. If Maryland "sticks its neck out" for businesses within the medical cannabis industry, these businesses should be grateful and not take advantage of the fact that the institution is backed by the State.

With additional compliance required to maintain an institution of this nature, there will be extra costs incurred by virtue of the extra work involved and additional personnel required to handle the work.<sup>198</sup> Ultimately, this cost of doing business should be shouldered by the customers. Because the cannabis-related businesses will now have an outlet to maintain their cash, they will no longer have the immense internal recording task of tracking all their cash and worrying about internal misappropriation. Since these businesses will not have to focus as much of their time and money on the accounting and security of their cash, it follows that they will be willing to pay this compliance fee to the bank, which will save them money in the long-

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<sup>194</sup> Friedman, *supra* note 176 ("In my mind the lack of banking boils down to financial institutions who are unwilling to go to the expense of establishing and maintaining the type of thorough due diligence program that will keep the regulators happy," quoting Paula Givens, a cannabis banking consultant and former attorney for the National Labor Relations Board).

<sup>195</sup> See *supra* Part II.B., at pp. 39-40.

<sup>196</sup> *Id.* at 41.

<sup>197</sup> Friedman, *supra* note 176 ("[Shane] Saunders said Maps has a zero-tolerance policy for offenders; a dispensary that was late setting up its annual inspection had its account closed.").

<sup>198</sup> *Id.* ("Monitoring and serving these accounts is expensive and labor intensive.").

term.<sup>199</sup> Maps Credit Union charges a \$250 application fee, \$250 annual inspection fee, and deposit fees on every transaction.<sup>200</sup> Since a state bank would only be servicing cannabis-related businesses, it would be justified in charging fees well in excess of these figures. In order for a state banking institution to adhere to all the compliance hurdles, there must be an expectation that this great service, in creating a sense of financial normalcy, comes with a great price.

### CONCLUSION

Soon Maryland will have a full-fledged medical cannabis industry.<sup>201</sup> As has been evidenced around the nation, there is a dearth of banking participants who are willing to provide services to cannabis-related businesses. This lack of banking is a direct consequence of cannabis's CSA designation as a Schedule I substance. Presently, Congress has remained unwavering with regards to re-scheduling or de-scheduling cannabis, which is absolutely essential to open up nationwide banking services to cannabis-related businesses. Since time is not on the side of Maryland's cannabis-related businesses, it is imperative that action be taken to assist and foster the growth of this important medical industry. Not only is the financial health of many future businesses at stake, the intent of the medical cannabis program will not be carried out if this financial burden exists. Cannabis-related businesses should be focusing on creating medicine that will ease the day-to-day suffering of individuals who endure debilitating conditions. Instead, these businesses have to spread their focus in order to maintain financial health, while hoping not to impede their core missions of providing this necessary and modern alternative medicine.

Maryland has already taken the first step by enacting laws that have created a medical cannabis program. This momentum should not be stifled by virtue of inaction in Washington, D.C. Maryland officials should partner with cannabis-related businesses to craft state banking legislation that is pragmatic and that caters to each party's needs and limitations. This is truly an opportunity where Maryland could assert itself as one of the most progressive states within the medical cannabis movement. Medical organizations and companies in this state have a history and reputation of providing world-class healthcare to its residents, the nation, and the world. Maryland should commit

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<sup>199</sup> *Id.* (“What we've found is these businesses are in such need of these services they are willing to comply with whatever hoops we put in front of them,” quoting Shane Saunders, vice president of operations for Maps Credit Union).

<sup>200</sup> *Id.*

<sup>201</sup> Press Release, Natalie M. LaPrade Maryland Medical Cannabis Commission Announces Revised Scoring Timeline for Grower and Processor License Applications (Dec. 21, 2015) (“Under the updated timeline, the Commission anticipates issuing Stage One approvals for grower and processor applicants by summer 2016.”).

to fostering a medical cannabis industry that one day enjoys the same reputation and history. In order to meet this objective, Maryland should create a banking platform that partners with cannabis-related businesses and assists them in achieving medical and financial success.